

IPC Discussion Paper – Standards Series  
December 2008

## **An Examination of Social Standards in Biofuels Sustainability Criteria**

BY STEVE CHARNOVITZ, JANE EARLEY AND ROBERT HOWSE

This paper was made possible by generous support from the German Federal Ministry for  
Economic Cooperation and Development



**IPC finds practical solutions** that support the more open and equitable trade of food & agricultural products to meet the world's growing needs.

© 2008 International Food & Agricultural Trade Policy Council

All rights reserved. No part of this publication may be reproduced by any means, either electronic or mechanical, without permission in writing from the publisher.

Published by the International Food & Agricultural Trade Policy Council

### Membership of the International Food & Agricultural Trade Policy Council

Carlo Trojan, *Chairman* | The Netherlands

Carl Hausmann, *Vice-Chairman* | United States      Marcelo Regunaga, *Vice-Chairman* | Argentina

Bernard Auxenfans (France)  
Malcolm Bailey (New Zealand)  
Devry Boughner (United States)  
Joachim von Braun (Germany)  
Piet Bukman (The Netherlands)  
Jason Clay (United States)  
Csába Csáki (Hungary)  
Pedro de Camargo Neto (Brazil)  
H.S. Dillion (Indonesia)  
Franz Fischler (Austria)  
Michael Gifford (Canada)

Timothy Groser (New Zealand)  
Sarah Hull (United States)  
Jikun Huang (China)  
Nicolas Imboden (Switzerland)  
Robbin Johnson (United States)  
Hans Jöhr (Switzerland)  
Timothy Josling (United Kingdom)  
Willem-Jan Laan (The Netherlands)  
Rolf Moehler (Belgium)  
Raul Montemayor (Philippines)  
Joe O'Mara (United States)

J.B. Penn (United States)  
Carlos Perez del Castillo (Uruguay)  
Michel Petit (France)  
Lord Henry Plumb (United Kingdom)  
Hiroshi Shiraiwa (Japan)  
Jiro Shiwaku (Japan)  
James Starkey (United States)  
Jerry Steiner (United States)  
Robert L. Thompson (United States)  
Ann Tutwiler (United States)  
Ajay Vashee (Zambia)

## About the Authors

**Professor Steve Charnovitz** (Reviewer) is an associate professor of law at The George Washington University Law School. Professor Charnovitz hails from Savannah, Georgia. He received a B.A. and J.D. from Yale University, and an M.P.P. from Harvard University. Before joining the Law School faculty in 2004, Professor Charnovitz practiced law for six years at Wilmer Hale in Washington, D.C. From 1995 to 1999, he was the director of the Global Environment and Trade Study (GETS) at Yale University. From 1991 to 1995, he was the policy director of the U.S. Competitiveness Policy Council. The Council issued four reports to the U.S. Congress and president. From 1987 to 1991, he was a legislative assistant to the speaker of the U.S. House of Representatives (Wright and Foley). Earlier in his career, he was an analyst at the U.S. Department of Labor where his assignments included worker rights in U.S. trade negotiations, trade adjustment assistance, and technical cooperation with Saudi Arabia. Professor Charnovitz serves on the board of editors of the *American Journal of International Law*, the editorial boards of the *Journal of International Economic Law*, the *Journal of Environment & Development*, and the *World Trade Review*. He is a member of the Council on Foreign Relations. A collection of his essays, *Trade Law and Global Governance*, was published in 2002 by Cameron May. He is admitted to the bar in New York and the District of Columbia.

**Jane Earley** is an attorney and the managing partner of Earley & White Consulting Group, LLC, a firm specializing in the international trade and environmental aspects of standards in international law, both those pertaining to food and environmental health and safety and those focused on sustainability and other quality-related attributes. Jane's broad experience in implementation of international standards at the national level in the food and agriculture, fisheries, and environment sectors is based on her experience in both the public and private sectors, and with both voluntary and regulatory standards. She recently served as Director of the Sustainable Agriculture Unit of the World Wildlife Fund of the United States, and as the CEO of the Marine Stewardship Council. Prior to this, she served as a trade negotiator with the Office of the United States Trade Representative, where she participated in litigating the Tuna/Dolphin and other trade and environment cases in the GATT and the WTO. She is currently working with clients from industry and with non-government organizations on projects involving emerging standards for biofuels and carbon credits, and an American National Standards Institute Draft Standard for Sustainable Agriculture. She has also participated in projects, and consulted with, the OECD, FAO, UNCTAD, and USAID.

**Robert Howse** is the Lloyd C. Nelson Professor of Law at New York University Law School. He has also taught at Toronto and Michigan University and as a visiting professor at Harvard Law School, Tel Aviv University, Hebrew University of Jerusalem, the University of Paris 1 (Pantheon-Sorbonne), Tsinghua University, and Osgoode Hall Law School in Canada and taught in the Academy of European Law, European University Institute, Florence. Since 2000, Professor Howse has been a member of the faculty of the World Trade Institute, Berne, Master's in International Law and Economics Programme. He is a frequent consultant or adviser to government agencies and international organizations such as the OECD, the World Bank, UNCTAD, the Inter-American Development Bank, the Law Commission of Canada and the UN Office of the High Commissioner for Human Rights. He is a contributor to the American Law Institute project on WTO Law. Howse serves on the editorial advisory boards of the *European Journal of International Law* and *Legal Issues in Economic Integration*. He is sub-series editor for the Oxford University Press Commentaries on the WTO treaties. Howse is the author, co-author, or co-editor of six books, including *The WTO: Law, Politics and Legitimacy* (2007) and, with Michael Trebilcock, *The Regulation of International Trade* (3rd. ed., 2005).

## Project Development and Guidance

**Charlotte Hebebrand, IPC Chief Executive**

## EXECUTIVE SUMMARY

The rapid expansion of biofuels markets has triggered calls for the inclusion of sustainability criteria for international trade of biofuels. Environmental sustainability criteria, i.e., the requirement for a biofuel to provide a certain percentage of greenhouse gas savings compared to fossil fuel, or for the agricultural feedstock to be sustainably cultivated, have garnered the greatest attention. Although environmental conditionality is the main thrust of most sustainable biofuels initiatives, some also call for the inclusion of social criteria, and it is these social criteria that are examined in this paper. Once considered a boon to rural populations, biofuels have also been reexamined in light of whether they contribute to food insecurity and poor labor conditions and violation of land rights.

All governments prescribe social standards for their own nationals and their own territory, and that exercise of sovereign power is not the subject of this paper. Rather, we want to introduce the topic of international (or transnational) social standards, that is, the prescription by one country or customs union of the social standards to be followed by producers of another country as a condition for access to the prescribing country or customs union's markets. In particular, we are interested in standards related to the production of goods (or inputs thereof) in international trade.

Distinguishing social concerns from ecological and economic concerns is fraught with difficulty because the categories overlap. Some may say that ecological and social concerns are non-economic, or non-market, whereas others might argue that environmental and labor practices do affect prices and output. Some might say that ecological concerns are physical while social concerns are psychological, but others might argue that social issues do have physical effects, such as war and conflict, refugees and migration, and health and infectious disease. Such divergences are but one element of a vast debate about linking social criteria to trade. As this paper will show, there are many policy as well as legal questions about such linkages. The purpose of this paper is to clarify what those controversies are. Beyond clarifying the complexity and controversies of the topic, the paper will conclude with a number of recommendations on how to constructively advance the debate over linking social criteria to trade measures. Although the paper is about social standards applied to biofuels trade in particular, it is also illustrative of the topic with regard to trade of agricultural products, or indeed of all products in general.

Prior to examining the types of linkages being suggested for biofuels specifically, this paper reviews the broader debate about trade and labor. In Section I, we provide a brief overview of the origins of the international labor and international trade regimes with special attention to how trade and labor issues intersected. Although there are a number of ideological differences at play, the most potent pertains to the question of whether linking social standards to trade is motivated by altruism or protectionism. Advocates of labor-trade conditionality view such linkages as a way to make trade fairer to the importing countries while others favor it as a way to improve human development in exporting countries. The opponents of conditionality typically oppose the concept of linkage and sometimes argue that losing trade access will make it harder for developing countries to raise labor standards and argue that such conditionality is at bottom motivated by protectionism. A somewhat uneasy truce was reached at the 1996 WTO Singapore Ministerial, during which WTO members clearly pointed to the International Labor Organisation (ILO) as the appropriate body to address labor issues, but also spoke out against the use of labour standards for protectionist purposes (although not excluding non-protectionist motivated linkages), and endorsed ongoing collaboration between the ILO and the WTO. The WTO has thus not taken any steps to establish a formal linkage between social criteria and trade, but — as the proliferation of sustainability standards for biofuels trade demonstrates — such linkages are clearly being made by governments, industry and other stakeholders.

With this backdrop, Section II examines the WTO compliance issues raised by such linkages. The legal questions are arguably as difficult as the ideological questions, in particular since some WTO provisions or jurisprudence can be interpreted in different ways. Traditionally thorny issues, such as how non-product-related process and production methods should be viewed under a WTO lens, or to what extent WTO rules apply to private-sector standards, abound in this analysis. The purpose of this section is not intended as a roadmap for those who would like to create social standards-trade linkages, but rather to highlight the legal complexities.

In the midst of this legal uncertainty, however, there are important concepts in international trade law, ranging from the core obligations of non-discrimination and national treatment, to a clear preference for internationally agreed standards, which must be taken into account in this rush to create sustainability criteria for biofuels (at the same time, as will be shown, there is a lack of clear definition of what is an international standard, creating further complexity).

By highlighting the complex and controversial nature of the topic, this paper seeks to inspire and inform greater deliberation about whether and how to apply social standards to biofuels trade. The broader debate about linking social conditionality to trade measures is likely to continue. For it to be resolved would require much greater common ground globally than now exists on the best method for advancing social rights around the world. Should trade measures be seen by the international community as an effective way to promote such rights, there will also be a need to clarify how WTO rules relate to such measures. Without such clarification, greater clarity may eventually be established through WTO jurisprudence, but this would be a lengthy process. Social standards for biofuels, however, are being developed and linked to trade without such common ground having been reached. In light of this, Section III recommends that greater consideration be given to the following questions:

- A multitude of different social standards schemes and certification schemes imposes considerable costs on producers, is especially harmful for developing country producers, and risks confusion among consumers. While competition and experimentation may have some advantages, international coordinating mechanisms are desirable, to ensure that the multiplication of different schemes does not have negative effects, and to ensure a minimum level of coherence.
- Many social issues raised in the context of biofuels production, i.e. unfavorable labor conditions and displacement of indigenous people, are not unique to the biofuels sector. This reality puts into serious question the wisdom of applying such social standards only to biofuels and their feedstocks. In the words of EU Commissioner Mandelson, “Why should we suggest that there is an obligation on producers who export sugar cane biofuel, but not on those who export plain sugar cane?”<sup>1</sup>
- One social issue, which is arguably unique to biofuels, as opposed to agricultural production more generally, is their impact on food security. Biofuels impact food security since they are produced from agricultural feedstock which might otherwise enter the food supply, or on land which otherwise might be used for the cultivation of food crops, and because they can contribute to higher food prices. Interestingly enough, however, food security is not included as a social standard in many of the sustainability schemes we examine in this paper, or if it is, is not well elaborated. Seen in this light, the mitigating effects that better labor standards might provide to poor populations producing biofuels would be completely undone if those same populations were impoverished by higher food prices.
- Since biofuels — rather than agricultural production more generally — are therefore uniquely tied to food security, this connection deserves to be examined on its own. Yet, it appears difficult to devise effective food security criteria through standards and therefore questionable whether the use of standards would be the most effective way to address this serious social problem. A simpler and faster alternative would arguably be to reconsider ambitious mandates for biofuels in transportation fuel or to promote more specifically biofuels produced from feedstocks, which do not compete with food, or which are produced on land, that does not compete with agricultural land.

---

<sup>1</sup> Peter Mandelson, “Keeping the crop in hand: By imposing rigorous sustainability standards, we can make a global market in biofuels work,” *The Guardian*, 29 April 2008.